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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 510

HAMISH SCOTT MacKAY,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, The Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Hamish Scott McKay, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 9th day of June, 1959.

CITATION TO OPINIONS BELOW

The unpublished opinion of the United States District Court for the District of Oregon was rendered on the

15th day of August, 1958, and appears at page 48 of the record. The opinion of the United States Court of Appeals for the Ninth Circuit is dated June 9, 1959 and appears at page 127 of the record. It is reported at 268 F2d 35, and is included as Appendix I of this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1959. A petition for rehearing was timely filed and was denied on August 21, 1959. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

The questions presented in this Petition are:

1. Whether 8 USC 1251 (a) (6) (C) violates the Constitution of the United States by reason of

(a) being a Bill of Attainder;

(b) violating Due Process of Law; and

(c) infringing upon Freedom of Speech.

2. Whether the petitioner's alleged association with the Communist Party, on the record of this case, was proved to have been "meaningful" and "political" within the rule of *Rowoldt v. Perfetto*, 355 US 115.

3. Whether petitioner was afforded a fair hearing on his application for suspension of deportation in that the special inquiry officer at said hearing was one and the same person who had served as hearing officer at

the initial hearings on the issue of whether petitioner was deportable and had labeled petitioner a liar.

4. Whether the order denying suspension of deportation was arbitrary, capricious and an abuse of discretion and otherwise not in accordance with law.

5. Whether petition is in fact a citizen of the United States and therefore not subject to deportation.

STATUTES INVOLVED

1. 8 USC 1251 (a) (6) (C), insofar as relevant here, reads as follows:

> Sec. 1251 (a) (6) (C): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> ". . . aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

2. 8 USC 1252 (b) (4), insofar as relevant here, reads as follows:

> Sec. 1252 (b) (4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

3. Revised Statutes of Canada, 1906, Chapter 77, Section 13 reads as follows:

> "Any alien who, within such limited time before taking the oaths or affirmations of residence and allegiance and procuring the same to be filed of record as hereinafter prescribed, as may be allowed by order or regulation of the Governor in Council, has resided in Canada for a term of not less than

three years, or has been in the service of the government for a term of not less than three years, and intends, when naturalized, either to reside in Canada or to serve under the government of Canada . . . may take and subscribe the oaths of residence and allegiance or of service and allegiance in Form A and apply for a certificate in Form B."

4. Convention between the United States and Great Britain, proclaimed September 16, 1870:

Article III, par. 2:

"In the same manner, if any such British subject as aforesaid naturalized in the United States should renew his residence within the dominions of her Brittanic Majesty, her Majesty's government may, on his own application and on such conditions as that government may think fit to impose, readmit him to the character and privileges of a British subject, and the United States shall not, in that case, claim him as a citizen of the United States on account of his former naturalization."

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the District of Oregon was invoked under Title 28, USC, Section 2241, 62 Stat. 964, and Title 5, USC, Section 1009, 60 Stat. 237.

Petitioner was born in Canada and entered the United States on November 24, 1928. The original warrant of arrest dated May 25, 1949, charged that MacKay was an alien subject to deportation in that after entry he was alleged to have been a member of an organization, association, society or group that advises, advocates or teaches the overthrow by force and vio-

lence of the government of the United States. During the hearing another charge was lodged against MacKay that he was deportable for allegedly having been a member of the Communist Party after entry into the United States.

On May 4, 1951, the hearing officer found that petitioner was an alien and that he had been a member of the Communist Party from 1936 to 1941 and that he was therefore subject to deportation. The ruling was affirmed by the Board of Immigration Appeals and by the United States Court of Appeals for the Ninth Circuit in *MacKay v. Boyd*, 218 F2d 666 (CA-9, 1955), cert. denied 355 US 840. On October 28, 1955 petitioner filed a motion with the Board of Immigration Appeals to reopen the hearing for the purpose of making application for suspension of deportation. On October 31, 1955 petitioner filed a complaint in the District Court for Oregon for a writ of habeas corpus and restraining order against his immediate deportation so that he might await the decision of the Board of Immigration Appeals. This was denied and upon appeal to the Court of Appeals, a restraining order was granted against deportation until the Board could act.

On May 16, 1956 a hearing on the application for suspension of deportation was held and on June 21, 1956 the hearing officer denied the relief requested. The Board of Immigration Appeals affirmed this decision on November 2, 1956.

On March 5, 1958 petitioner appealed to the Board of Immigration Appeals requesting a review of his case in the light of the decision of this Court in *Rowoldt*

v. Perfetto, 355 US 115. The Board dismissed the appeal and ordered petitioner to surrender for deportation.

On June 19, 1958 petitioner filed a petition for writ of habeas corpus and complaint for injunctive relief in the United States District Court for the District of Oregon and after hearing, the District Judge dismissed the petition and discharged the writ. In the same order, petitioner was remanded to the Immigration Service for deportation. This order was dated August 15, 1958.

On August 18, 1958, petitioner filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit and applied for an order restraining the Immigration Service from deporting him during the course of appeal, and enlarging him on bail. The matter was orally argued to the Court and on August 27, 1958 the Court restrained respondent from deporting petitioner during the pendency of the appeal and it also enlarged the petitioner on bail until termination of the appeal. On June 9, 1959, the Court of Appeals affirmed the District Court on the merits.

REASONS FOR GRANTING THE WRIT

1. The Statute Under Which Petitioner Was Ordered Deported is Unconstitutional.

Petitioner recognizes that the holdings of this Court in *Galvan v. Press,* 247 US 522, and *Harisiades v. Shaughnessy,* 342 US 580, sustained the Act in question against the contention that it is an *ex post facto* law and in violation of due process of law.

Petitioner also notes, however, that at no time has this Court passed upon the question of whether the Act is a bill of attainder. Recently this Court has granted certiorari in the case of *Niukkanen v. McAlexander*, No. 130, October Term, 1959, in which this identical question is involved.

Petitioner submits that the legislation which he here questions falls squarely within the cases decided by this Court such as *Cummings v. Missouri*, 4 Wall. 277; *Ex Parte Garland*, 4 Wall. 333; *Yick Wo v. Hopkins*, 118 US 356; *U. S. v. Lovett*, 328 US 303; *Ng Fung Ho v. White*, 259 US 276.

It is therefore suggested that it would be appropriate for this Court to grant this Petition in view of the pending decision of this vital constitutional question. The considerations expressed by counsel in the *Niukkanen* case as to why certiorari should have been granted there apply with equal force in this case and we see no reason for extending the record unduly by repeating them.

2. The Evidence Shows That The Alleged Membership of The Petitioner In The Communist Party Was Not A Meaningful Political Association Under The Rule Of Rowoldt v. Perfetto, Supra.

Here again, as in *Niukkanen*, the issue is whether this alien has been shown by substantial, probative evidence to have had the kind of meaningful association with the Communist Party as required by this Court in the *Rowoldt* case.

Though the factual situation is somewhat different in this case than in *Niukkanen*, the evidence presented by the government against petitioner is also of such a nature that it fails to meet legal standards.

One problem is that Courts of Appeals as well as many District Courts have so limited their review of the factual issues in this type of deportation case that the decisions of hearing officers who are employed by the Immigration and Naturalization Service have been approved almost automatically. Repeatedly the Courts have said, as did the Court of Appeals in this case, that if there is any evidence, no matter how thin or unbelievable, to support the hearing officer's decision of deportability, the matter is closed as far as judicial review is concerned. Petitioner is confident that had the evidence against him been presented initially to a Court of law composed of judges instead of trial examiners or hearing officers employed by the agency in question, the decision would have been entirely different.

Petitioner suggests that the scope of review of the administrative decisions should be broader than exercised by Courts of Appeals. The Act requires that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." It is petitioner's contention that the reviewing courts should go further than the "scintilla rule." They should determine if the evidence is "reasonable," "substantial" and "probative" by analyzing it, weighing the credibility of the witnesses, and taking into account contrary testimony.

In this case, for instance, the government depended upon four witnesses. The first was Lee A. Knipe. He testified that he had seen petitioner at closed meetings of the Communist Party and at other activities. On cross-examination, however, he admitted that he had never seen petitioner's Communist Party membership book and had never seen him pay dues to the Communist Party (Tr. 18). He also testified that on previous occasions immediately preceding the hearing he had testified in other deportation cases (Tr. 18). However, his memory about the details of Communist Party meetings at which he allegedly saw petitioner was vague and he was finally forced to admit that he had never seen petitioner circulate any literature of any kind (Tr. 19-21).

The government's second witness was Irene Mahoney, who was formerly the wife of Knipe. Although she testified she knew petitioner to be a member of the Communist Party she was unable to provide any details and on cross-examination demonstrated a fantastic lack of recollection of the most obvious details of her life during the time she claimed to know petitioner as a member of the Communist Party. She could not remember even such elementary facts as her employment, residence, and people she knew during this time. A reading of her testimony in full can demonstrate her total unreliability.

The third government witness was Robert McClure Hood. He joined the Communist Party in 1940 as a paid spy for the Portland Police Department (Tr. 442-444). He testified he had seen petitioner at meetings of the

Communist Party but he was unable to shed any light upon petitioner's motives or interests in being there.

The last witness produced by the government was Sylvia N. Sivertson, who is the former wife of petitioner. Petitioner obtained a decree of divorce from Mrs. Sivertson in 1944. He had also obtained the care and custody of their minor children (Tr. 764). She admitted she had done a great deal of drinking which led up to this divorce and that she had been arrested in Portland on charges of being drunk and that she had been confined to jail (Tr. 766). Although she claimed to have been active in the Communist Party with her husband, she was unable to remember any details as to the nature of the so-called leaflets and literature she said she distributed (Tr. 773). There was a strong motive for her to lie about petitioner's alleged connection with the Communist Party. It was, pure and simple, revenge. She wanted to get even with her former husband for obtaining a divorce from her and the custody of their children.

On such a record justice requires a reversal of his order of deportation.

3. Petitioner Is Not An Alien Because His Father Was An American Citizen.

Petitioner's father was born in Scotland and naturalized an American citizen in 1900 in North Dakota. Petitioner's mother was a native born American citizen (Tr 605-606). In 1903 the family moved to Canada and in 1905 the petitioner's father obtained a certificate of naturalization as a Canadian citizen.

Section 13, Chapter 77 of the Revised Statutes of Canada, 1906, provided that an alien must reside in Canada for a term of not less than three years before he may take and subscribe to the oath of residence and allegiance which were prerequisites to naturalization. Since petitioner's father entered Canada no earlier than June, 1903 and the certificate of naturalization which appears as Exhibit 15 is dated February 8, 1905 it is mathematically impossible for him to have fulfilled the jurisdictional requirement of three years residence. As a result petitioner contends that on its face, his father's alleged Canadian citizenship was null and void and of no effect.

In this connection it is necessary to interpret the treaty between the United States and Canada dated May 13, 1870, 16 Stat. 775, which provides that citizens of either country naturalized as citizens or subjects of the other shall be treated as citizens of such country by the country of origin. The treaty further provides that in case citizens of one country naturalized in another wish to renew their residence in the country of origin they may be restored to the privileges of citizenship there "on such conditions as the government may think fit to impose." Thus, when petitioner's father, originally a British subject, was naturalized an American citizen, this status continued until he satisfied the requirements of Canadian naturalization. It is obvious that he failed to satisfy these requirements by not having the necessary three years residence before he applied for Canadian citizenship.

Petitioner contends that the aforesaid treaty between the United States and Great Britain was designed to eliminate the possibility of statelessness as between citizens of the two countries. They retain the citizenship of one country until they acquire valid citizenship in the other.

Petitioner's father remained a United States citizen and MacKay inherited this status and is therefore not an alien.

4. Petitioner Was Denied A Fair Hearing On His Application For Suspension Of Deportation Because The Special Inquiry Officer Presiding Was One And The Same Person Who Had Served As Hearing Officer In The Initial Proceeding On Petitioner's Deportability And Was Not An Impartial Inquiry Officer As Required By Law.

The presiding officer at the hearing to determine whether petitioner was a deportable alien was John W. Keane. In the course of his decision, he necessarily passed upon the apparent conflict of testimony in many particulars between petitioner and his character witness on one hand, and the government's witnesses and their testimony on the other. The hearing officer chose to believe the government's witnesses and their testimony that petitioner had been a member of the Communist Party. Petitioner testified that he was not a member of the Communist Party and had never been a member. The hearing officer in his opinion indicated his belief that petitioner lied.

> "It is highly improbable that the testimony of the government witnesses is a fabrication. The record will not sustain such a determination." (Decision, p. 16)

When the hearing on petitioner's application for suspension of deportation was held the objection by counsel for petitioner to Mr. Keane presiding as special inquiry officer was overruled (Tr. 801).

Although the special inquiry officer admitted that petitioner established statutory eligibility for suspension of deportation (Decision, p. 3), he nevertheless held that it should be denied because he did not believe the testimony of petitioner. This result was predetermined before the hearing ever began. Mr. Keane had decided that petitioner was a liar in the first hearing and his conclusion could only be that he would not grant suspension of deportation to a liar.

Under these circumstances petitioner contends that he has been denied due process of law, namely the right to a hearing before an impartial judge or hearing officer.

5. The Order Denying Petitioner Suspension of Deportation Was Arbitrary, Capricious And An Abuse Of Discretion, And Otherwise Not In Accordance With Law.

The Petitioner established his eligibility for suspension of deportation under Section 1254 (a) (5), Title 8, USC (Decision, p. 3). However, this relief was denied because he declined to disclose some information in connection with the Oregon Committee for the Protection of the Foreign Born, an association which was formed to assist persons whom the Immigration Service seeks to deport.

The record (Tr. 8-48) shows that the examining offi-

cer attempted to inquire as to the officers of this committee and with respect to certain persons who might be connected with it. When these questions were put to the petitioner, counsel objected to each of them; and his objections were overruled by the special inquiry officer. However, the special inquiry officer at no time ordered petitioner to answer these questions. The examining officer did not press them. The petitioner answered many questions about the Oregon Committee for the Protection of the Foreign Born but declined to give the names of individuals connected with it.

These questions were wholly irrelevant to the determination of whether petitioner was entitled to suspension of deportation. There is nothing in the record to cast doubt upon the legality or propriety of this organization or any of its activities. If the government has evidence that the Committee is a subversive association with which aliens can have contact only at the peril of losing their rights to suspension of deportation, it should establish its charges by competent evidence.

Instead, the government choses to take a more devious path. It inquires of an applicant for suspension not only about the activities of the Committee but it also attempts to find out the names of its members and leaders. There is an implied threat that the government will try to deport the aliens among them.

Petitioner contends that it was arbitrary and capricious to deny his suspension of deportation because he failed to answer questions which were not clearly related to the purpose of the inquiry.

CONCLUSION

Petitioner believes that this case, like *Niukkanen v. McAlexander, supra*, presents squarely the application of the doctrine of bill of attainder, prohibited by the United States Constitution. Up to this time, this Honorable Court has not decided this fundamental question, and we most earnestly urge a review of this proposition in the instant case, as well as the other constitutional questions involved. If, however, the Court does not wish to review the constitutional issues, we urge it to grant certiorari on the other issues which have been raised on this appeal, namely, that the hearing on the application for suspension of deportation was improper, that the decision thereon was unfair and illegal, that petitioner is not an alien, and that he is not deportable under *Rowoldt v. Perfetto, supra*.

For the foregoing reasons, the writ should issue.

Respectfully submitted,

REUBEN LENSKE,
Attorney for Petitioner.

APPENDIX I

OPINION OF THE COURT OF APPEALS

[Title of Court and Cause]

Appeal from the United States District Court for the District of Oregon

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Before: Pope, Chambers, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

This is an appeal from a judgment dismissing an application for a writ of habeas corpus. The writ was sought for the purpose of setting aside an order for appellant's deportation and an order denying his application for suspension of deportation. Appellant had been ordered deported as an alien who was a member of the Communist Party of the United States.[1]

Appellant challenges the order of deportation on three grounds. The first of these is that the act under which he was ordered deported is unconstitutional as being in violation of article 1, section 9, clause 3, of the Constitution (bill of attainder), and the First and Fifth Amendments.

The identical contention was advanced in Niukkanen v. Boyd, 9 Cir., 241 F.2d 938, and rejected by this court. On a subsequent appeal in the same case, Niukkanen v.

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[1]Pursuant to the act of October 16, 1918, as amended by section 22 of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of 1950), 64 Stat. 1006, 8 U.S.C. § 137, now section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U.S.C.A., § 1251(a)(6)(C).

McAlexander, 9 Cir., F.2d , decided April 6, 1959, we declined to re-examine the contention. The same constitutional argument was likewise advanced and rejected in Ocon v. Del Guercio, 9 Cir., 237 F.2d 177, 179-180.

On the authorities cited and those referred to therein, we hold that the act is not unconstitutional in the respects claimed.

The second ground on which appellnt attacks the order of deportation is predicated upon the recent decision of the Supreme Court in Rowoldt v. Perfetto, 355 U. S. 115. Appellant argues that there is not here substantial, probative, and reasonable evidence that he had a "meaningful" association with the Communist Party, as the quoted term is used in Rowoldt.

On a previous appeal in an earlier habeas corpus proceeding brought by appellant to test this same deportation order, this court held that the evidence was sufficient to sustain the finding that he became a member of the Communist Party of the United States MacKay v. Boyd, 9 Cir., 218 F.2d 666.

The former appeal was decided prior to the decision in Rowoldt v. Perfetto. However, in our recent case of Niukkanen v. McAlexander, supra, we had occasion to consider the Rowoldt decision. It was there held that the Supreme Court in Rowoldt did not purport to modify the principles to be applied in construing the term "member" as announced by Galvan v. Press, 347 U. S 522.[2]

[2]Galvan v. Press had been decided prior to our decision on MacKay's former appeal.

Substantial evidence was introduced in the instant Immigration and Naturalization Service hearing which tended to show that: (1) Appellant was a voluntary member of the Communist Party of the United States from 1934 to at least 1943; (2) he paid dues to the party; (3) he attended a number of closed meetings of the Albina branch of the party in Portland, Oregon; (4) he was selected by the executive board of the Albina branch to attend Communist Party schools and training classes; (5) he received instruction at these schools and classes from James Murphy, the Oregon State organizer, and from a Washington state party official; (6) appellant attended a meeting of the party held for the purpose of electing Murphy to the Oregon State Senate; (7) appellant prevailed upon his wife to join the party; (8) appellant was active in the solicitation of new members by stenciling "Join the Communist Party" on sidewalks; (9) appellant engaged in direct solicitation on behalf of the party and also distributed leaflets put out by the party.

It is our opinion that the evidence summarized above more than meets the minimum requirements of proof to establish Communist Party membership, as set out in Galvan v. Press, and as referred to in Rowoldt v. Perfetto as "meaningful association." There is here no showing, as in Rowoldt, that a "bread and butter" motive drove appellant to join the party.

Appellant challanges the credibility of the witnesses and asserted uncertainties and weaknesses in their testimony. All this was decided against him in MacKay v. Boyd, and will not now be re-examined.

The third ground relied upon by appellant in attacking the deportation order is that under the evidence received and offered he was not shown to be an alien.

This contention is based upon the following asserted facts which, for present purposes, we accept as true: Appellant's father, James Scott MacKay, was born in Scotland. He was naturalized an American citizen on July 9, 1900, in North Dakota. Appellant's mother was a native-born American citizen. On June 19, 1903, the father and mother were married in the State of North Dakota. They left immediately for Canada and eventually settled near the city of Calgary. The father had not been in Canada prior to June 19, 1903.

On February 8, 1905, the father obtained a certificate of naturalization as a Canadian citizen. This certificate was issued upon the order of the supreme court of the "Northwest Territories of the Dominion of Canada." It is herein recited, among other things, that James S. MacKay "has duly resided in Canada for the period of three years." Appellant was born in Canada on June 10, 1905. The father died in Canada on February 9, 1928, and appellant last entered the United States from Canada on November 28, 1928.

Chapter 77, section 13, Revised Statutes of Canada, 1906, was in effect at the time appellant's father received his certificate of Canadian naturalization. It is therein provided that an alien must reside within Canada for a term of not less than three years before he may take and subscribe to the oath of residence and allegiance which is a prerequisite to naturalization.

Under the assumed facts, appellant's father could not have resided in Canada for a term of three years before receiving his certificate of Canadian naturalization on February 8, 1905. Relying upon this circumstance, appellant argues that his father's Canadian citizenship was void. Then calling attention to a treaty provision which he believes was intended to eliminate "statelessness" under such circumstances,[3] appellant contends that his father was still an American citizen at the time of appellant's birth on June 10, 1905.

A decree of naturalization issued by a court in this country is not open to collateral attack in any court in this country by any private individual.[4] Moreover, the government of the United States has long denied the right of a foreign government to impeach a certificate of naturalization issued by an American court. Van Dyne, Citizenship of the United States (1904), page 107. It would appear that considerations of comity and reciprocity would thus preclude American courts from entertaining a collateral attack upon a decree of naturalization entered by a foreign court.

The Canadian citizenship of appellant's father was purportedly in good standing at the time of the father's

[3]Treaty between the United States and Great Britain dated May 13, 1870, 16 Stat. 775.

[4]Tutun v. United States, 270 U.S. 568, 577-578; Johannessen v. United States, 225 U.S. 227, 236; Spratt v. Spratt, 29 U.S. 393; Pintsch Compressing Co. v. Bergin, C.C.D.Mass., 84 Fed. 140. See, also, Campbell v Gordon, 10 U.S. 176; Van Dyne, Naturalization in the United States (1907), page 134; Vanfleet, Law of Collateral Attack on Judicial Proceedings (1892), sec. 567; 6 A.L.R. 407, Annotation.

death. His Canadian naturalization had not been questioned, and he and his family, the Canadian courts and government, and all concerned apparently accepted and treated the father as a Canadian citizen. In view of these circumstances and of the legal principles referred to above, we do not believe that the son may now, after the father's death, and in the courts of the United States, and for the purposes indicated, collaterally attack his father's Canadian citizenship.

But even if this Canadian decree of naturalization were open to collateral attack in this proceeding, the evidence offered and received is insufficient for impeachment purposes. This evidence shows an inaccuracy in the father's declaration of residence, but nothing more. There is no allegation of proof of intentional fraud. Such a showing would be insufficient to invalidate an American decree of naturalization in an American court.[5] If the showing made would be insufficient to impeach a decree of naturalization entered by an American court, it would seem to be likewise insufficient to warrant impeachment of a similar foreign decree.

Assuming, however, that fraud was shown, it would be intrinsic and not extrinsic fraud. American courts have uniformly held that a foreign judgment cannot be attacked for intrinsic fraud such, for example, as the reception of false testimony. 2 Beale, Conflict of Laws (1935) sec. 440.4, pages 1403-1404.

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[5]In re McCoppin, 5 Sawy. 630, Fed. Cas. No. 8,713; Van Dyne, Citizenship of the United States (1904), page 108.

We are therefore of the opinion that the fact of alienage was sufficiently established.[6]

We conclude that the order of deportation is valid.

Appellant's attack upon the order denying his application for suspension of deportation is based upon two grounds.[7] The first of these is that he was not afforded a fair hearing before the Immigration and Naturalization Service on this application because the hearing officer was the same person who had served as hearing officer in the deportation proceedings.[8]

Appellant had testified in the deportation hearing to the effect that he was not and had never been a member of the Communist Party. The hearing officer apparently disbelieved this testimony, since his order was based upon a finding contrary to appellant's testimony. In his opinion supporting the order denying the application for suspension of deportation, this same hearing officer characterized appellant's testimony at the suspension hearing as "evasive." Appellant wishes us to conclude

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[6]The view just stated makes it unnecessary to consider the following additional arguments advanced by the government in resisting appellant's contention that he was not proved to be an alien: (1) That appellant should have raised this question in the agency proceedings and in the prior habeas corpus proceeding, and may not do so now; and (2) that whether or not appellant's father became a Canadian citizen, his oath of allegiance to Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, was an act of expatriation which terminated his American citizenship.

[7]This application was made pursuant to section 244(a)(5) of the Immigration and Nationality Act, 8 U.S.C.A. section 1254(a)(5).

[8]Appropriate objection to the presence of the same presiding officer was made at the outset of the hearing on the application for suspension of deportation.

from this that the hearing officer was biased against appellant as the suspension hearing and revealed such bias in his opinion thereafter entered.

The unfavorable opinion of a party or witness which a hearing officer or a trial judge may entertain as a result of evidence received in a prior and connected hearing involving that individual is not "bias" in the invidious sense. It is in effect a judicially-determined finding which may properly influence such officer or judge in a supplemental proceeding involving the penalty or punishment to be assessed, or the grace to be extended. No unfairness or lack of due process was inherent in the fact that the same hearing officer presided in both proceedings.[9]

The second reason advanced by appellant why the order denying the application for suspension of deportation should be set aside is that such order was arbitrary and capricious, and represents an abuse of discretion.

The hearing officer held that appellant was statutorily eligible for suspension of deportation. This necessarily included a finding that deportation would result in exceptional and extremely unusual hardship to the alien or to members of his family. But the granting of such relief to one eligible therefor is an act of grace entrusted to the discretion of the Attorney General or his delegate. Jay v. Boyd, 351 U. S. 345, 353. Judicial review of the exercise of such discretion is confined within extremely narrow limits. See Cakmar v. Hoy, 9 Cir., 265 F.2d 59.

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[9]The record indisputably establishes that MacKay was an evasive witness at the suspension hearing.

The hearing officer here determined that in view of the grounds for the deportation order, deportation should not be suspended unless there is

> ". . . some exacting evidence in the record that since that time [the time when MacKay became a party member, according to the finding of the hearing officer] the respondent has followed a course of action which would persuade the Attorney General or his delegate that the respondent has actively opposed the doctrine, program, principles and ideology of the Communist Party and that he has not associated, affiliated or contributed time or money to movements sympathetic to the Communist cause. . . ."

This test which the hearing officer determined to apply does not fall under any judicially recognizable interdict. See Cakmar v. Hoy, supra. The reasons which led the hearing officer to determine that appellant had failed to meet that test are likewise unassailable in a judicial proceeding.[10] See Mahler v. Eby, 264 U. S. 32, 42; Jiminez v. Barber, 9 Cir., 235 F.2d 922, 252 F.2d 550.

The judgment is affirmed.

(Endorsed:) Opinion. Filed June 9, 1959.

Paul P. O'Brien, Clerk.

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[10]The hearing officer stated in his opinion:

> ". . . The respondent and his wife were very effusive in giving information as to their activities in the Oregon Grange, and the Carpenters Union, and the Boy Scouts of America, and other organizations of unquestioned reputation and purpose. However, the record reveals that he and his wife refused to disclose information as to other organizations in which he actively participated. He refused to divulge information about the 'Committee for the Protection of Oregon Foreign Born', as did his wife (record, pages 848, 851, 852, 853-55, 870). In fact, many of the respondent's answers were evasive. He has elected to stand mute and refused to disclose information which is material to a determination as to whether he merits suspension of deportation. . . ."

APPENDIX II

JUDGMENT OF THE COURT OF APPEALS

[Title of Court and Cause]

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(ENDORSED)
Filed and entered June 9, 1959
PAUL P. O'BRIEN, Clerk